UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case Nos. 15-2285, 15-2592

The Finley Hospital, Petitioner, v. National Labor Relations Board, Respondent, and Service Employees International Union, Local 199, Intervenor.	On a Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

MOTION TO STAY MANDATE PENDING
PETITION FOR WRIT OF CERTIORARI

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 41(d)(2), Intervenor Service Employees International Union, Local 199 ("Local 199"), moves for a 90-day stay of the mandate pending the filing of a petition for writ of certiorari in the U.S. Supreme Court.

Stays pending certiorari petitions are explicitly contemplated by Rule 41, *see* FRAP 41(d)(2)(A), and Intervenor's petition will present "substantial question[s]" within the meaning of that Rule, *id.* Intervenor's petition also has at least a

"reasonable chance" of being granted, Internal Operating Procedures, Eighth Cir., IV(F), and there is good cause for a stay, FRAP 41(d)(2)(A).

BACKGROUND

After giving employee-nurses annual raises every year from 1996 to June 20, 2005, *see, e.g.*, JA 294, Petitioner Finley Hospital ("Finley" or "Hospital") entered into a collective bargaining agreement ("CBA") that confirmed and continued its annual wage-raise practice, JA 276. Almost immediately after the CBA expired, Finley notified its nurses that because of the expiration they would not receive annual raises for the first time since 1996. JA 294, 327; BSA 4. Finley notified nurses of this change in practice notwithstanding that the National Labor Relations Act ("NLRA" or "Act") requires maintenance of the status quo that obtained during the term of an expired agreement, *see, e.g.*, *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988); *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *NLRB v. Hardesty Co.*, 308 F.3d 859, 864–65 (8th Cir. 2002) —a status quo that in this case included nurses receiving standardized, non-discretionary raises on their annual anniversary dates, JA 276.

The National Labor Relations Board ("NLRB") charged Finley with violating the Act, JA 275–79, and an Administrative Law Judge ("ALJ") and two NLRB panels ruled in favor of the Board. Judge Ira Sandron conducted a two-day

trial and found that Finley had violated the Act by "unilaterally discontinuing raises . . . upon expiration of the [parties'] agreement." JA 298. A first Board panel agreed with the ALJ in 2012, *see* JA 249, and a second agreed with the ALJ in 2015, *see* JA 275.

Finley Hospital petitioned for review, and a panel of this Court ruled in Finley's favor, disagreeing with the prior ALJ and Board decisions. Over a dissent from Judge Murphy, the panel majority held that Finley could stop paying annual raises before the parties reached impasse. The panel majority invoked two grounds not relied on by the Board below, *i.e.*, that SEIU Local 199 "explicitly" agreed Finley could stop paying raises post-expiration (notwithstanding its members' rights under the NLRA), Op. 7, and that there was never any "status quo" of annual raises, *id*. at 7–8.

Intervenor petitioned for rehearing or rehearing en banc citing conflicts with Supreme Court and other-circuit authority. The Court denied Intervenor's petition on October 27, 2016. Judge Murphy and Judge Kelly would have granted rehearing.

ARGUMENT

I. Intervenor's Petition for Certiorari Will Present Substantial Questions and Has At Least a Reasonable Chance of Being Granted.

Local 199 anticipates that its certiorari petition will present several questions for Supreme Court review. All are substantial and create a reasonable chance of

certiorari being granted, but the standard for a stay is satisfied if even one is substantial and creates a reasonable chance of review.

A. Intervenor's petition will present the question whether a recurring obligation imposed by a one-year CBA is sufficient to establish a status quo under the NLRA.

The panel majority gave as one of the bases for its decision that Finley's contractual raise obligation was not in effect long enough to create a status quo. *See* Op. 7–8. That holding conflicts with *NLRB v. Katz*, in which the Supreme Court held that a recurring obligation to provide paid sick leave during an eleven-month period created a status quo that could not be altered. *See* 369 U.S. at 744. In fact, the case for a status quo here is stronger than in *Katz* in at least two respects: Finley Hospital gave annual raises for ten years, not one, and the Hospital's annual-raise obligation was embodied in contract, not just in employer policy. *Cf. id*. at 740, 744.

The conflict between the panel majority opinion and the Supreme Court's long-standing *Katz* decision provides a substantial basis for Supreme Court review. *See* U.S. S. Ct. R. 10(c) (recognizing conflict with Supreme Court authority as a ground for certiorari).

B. Intervenor's petition will also present the question whether ordinary contract durational language alters a pre-expiration status quo for purposes of the NLRA.

Because the relevant status quo under the Act is that which obtained immediately *before* contract expiration, *see, e.g.*, *Laborers Health*, 484 U.S. at 544 n.6; *E.I. DuPont de Nemours*, 364 N.L.R.B. No. 113, 2016 NLRB LEXIS 661, at *18 (Aug. 26, 2016), durational language stating that an obligation ends *at* expiration is entirely consistent with that obligation's being part of the statutory status quo. Thus, the NLRB and other circuits do not treat ordinary durational language as affecting status quo for purposes of the Act. Instead, they consider only whether such language amounts to a clear and unmistakable waiver of the requirement to maintain that status quo. *See, e.g.*, *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1079–82 (9th Cir. 2008); *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 132–34 (D.C. Cir. 2001); *NLRB v. Gen. Tire & Rubber Co.*, 795 F.2d 585, 588 (6th Cir. 1986); *Wilkes-Barre Gen. Hosp.*, 203 L.R.R.M. 2040, 2015 NLRB LEXIS 537, at *20–21 (July 14, 2015); *Lincoln Lutheran of Racine*, 204 L.R.R.M. 1234, 2015 NLRB LEXIS 674, at *30 n.23 (Aug. 27, 2015); *AlliedSignal Aerospace*, 330 N.L.R.B. 1216, 1216 (2000).

In *Honeywell*, the Board further explained that because most contract obligations extend for the period of the contract but not after, there would be little statutory status quo to speak of if every contract obligation that ended at expiration was removed from that status quo. *See* 253 F.3d at 133. Thus, durational language suggesting the ordinary fact that a contract obligation ends at expiration cannot be held to affect the status quo without "effectively drain[ing] the unilateral change doctrine of any coherent meaning." *Id*.

These conflicts between the panel majority decision and other appellate authority provide substantial bases for Supreme Court review. *See* U.S. S. Ct. R. 10(a) (recognizing circuit conflict as a ground for certiorari).

C. Intervenor's petition will also present the question whether contract durational language that says nothing about the contracting parties' obligations post-contract is an "explicit" agreement regarding the parties' obligations during the post-contract period.

The contract language at issue in this case states the parties' obligations "during" the term of their agreement but is silent about their obligations after contract expiration. JA 276. The post-expiration period is not mentioned in the CBA, *id*., and the parties did not discuss it, JA 294. Nonetheless, the panel majority held that the contract's language about obligations "during" the CBA's

term was an "explicit[]" agreement that Finley could stop paying raises after the contract expired. Op. 7.

The panel majority's holding is inconsistent with *Local Joint Executive Board* and other decisions. In *Local Joint Executive Board*, the Ninth Circuit considered materially indistinguishable contract language and held that it said "nothing about what happens after the agreement expires" and "[did] not state"—"explicitly" or otherwise—"that [the disputed obligation] will terminate on expiration of the Agreements." 540 F.3d at 1077, 1080. Other courts have reached the same conclusion about similar contract language. *See, e.g.*, *Honeywell*, 253 F.3d at 132–33; *Gen. Tire & Rubber Co.*, 795 F.2d at 588.

This conflict between the panel majority opinion and other circuit decisions provides another substantial basis for Supreme Court review. *See* U.S. S. Ct. R. 10(a).

D. Finally, Intervenor's petition will raise the question whether an appellate court may properly overturn an NLRB decision on a ground not relied on by the Board without either remanding to the agency or acknowledging the Board's best evidence related to the new ground.

As is its consistent practice, the NLRB did not consider the parties' standard durational language as relevant to determining the statutory status quo; nor did the Board consider whether a one-year contract can establish a status quo. Instead, the

Board treated the status quo question as entirely uncontroversial under its precedent and analyzed whether the parties had clearly and unmistakably waived the no-unilateral-change rule. *See* JA 276.

By contrast, the panel majority did not consider waiver and instead based its ruling on a new ground—namely, that there was never a status quo of annual raises in the first place. Op. 7–8. That approach is inconsistent with the Supreme Court's rule that "the grounds upon which an administrative order must be judged are those upon which the record discloses its action was based," *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), relied on by Finley Hospital itself. And the error is compounded by the failure either to remand to the Board for re-consideration under the panel majority's test or to consider the Board's best evidence under that test, *i.e.*, evidence that Finley gave annual raises every year for nine years even before the parties agreed on a contract. *See* Op. 7–8; JA 294; BSA 4.

II. There Is Good Cause for a Stay.

A stay is appropriate for at least three reasons.

First, Finley Hospital and Local 199 are right now in the midst of bargaining and have been in negotiations for more than six weeks. Local 199 hopes that the parties will reach agreement soon, since the current nurses' CBA expires on November 7, 2016. Issuing the mandate and returning this case to the Board would change the status quo against which the parties have already spent

significant time negotiating, with little time remaining before expiration of the current contract.

Second, Intervenor has learned from other SEIU local unions that employers in their jurisdictions are watching this case closely, with some having indicated that they hope to invoke the panel majority decision, which they apparently see as a change in the law in their favor, to gain leverage in bargaining. If the mandate issues, employers will be encouraged to proceed in this manner, and employees may have to give up items in bargaining that they otherwise would not—concessions the employees will not be able to undo if the Supreme Court reinstates the Board's decision after a CBA is signed. Staying the mandate will help avoid this prejudice before the case is actually finalized.

Finally, a stay will not prejudice Finley Hospital. This dispute has been pending in one forum or another since 2006. *See* JA 294. A stay in the mandate will only maintain the scenario the parties have operated under for years and will be brief compared to the time that has already passed. Moreover, because the panel ruled in the Hospital's favor, Finley will not have to pay back raises while Intervenor's certiorari petition is pending.

Dated: November 2, 2016

Respectfully submitted,

s/ Claire Prestel

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CERTIFICATE OF VIRUS CHECK

Pursuant to 8th Cir. R. 28A(h)(2), I hereby certify that the electronic version of the foregoing document has been scanned for viruses and is virus-free.

Dated: November 2, 2016

s/ Claire Prestel
Claire Prestel

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Claire Prestel
Claire Prestel